Filed 6/4/03 In re B.D. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re B. D. et al., Persons Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. ANGELA D., Defendant and Appellant.	E032887 (Super.Ct.No. J-99984) OPINION

APPEAL from the Superior Court of Riverside County. H. Dennis Myers, Judge. Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant Angela D.

William C. Katzenstein, County Counsel, and Julie A. Koons, Deputy County Counsel, for Plaintiff and Respondent.

Harry Zimmerman, under appointment by the Court of Appeal, for Minors.

Angela D. (Mother) appeals from the juvenile court's order terminating her parental rights to B. (born in 1998), twins K. and M. (born in 1999), and D. (born in 2002) pursuant to Welfare and Institutions Code section 366.26.[1] On appeal, Mother contends that the children were provided with ineffective assistance of counsel when their attorney failed to withdraw from representing them given their divergent interests regarding their permanent plans.

PROCEDURAL BACKGROUND AND FACTS

As Mother points out, we are familiar with this case, having recently denied, on the merits, her petition for extraordinary relief from the juvenile court's orders terminating family reunification services and setting a selection and implementation hearing.

The children came to the attention of the Riverside County Department of Public Social Services (Department) on September 28, 2000, when M. was taken to the Hemet Valley Hospital for a nonaccidental spiral fracture to her left femur. After further investigation, the Department, on October 2, 2000, filed a petition under section 300, subdivisions (a), (b), and (j), alleging that M. had suffered serious physical harm and that her siblings were at risk for suffering similar harm. The court found the allegations true, ordered the children removed from parental custody and Mother was provided family reunification services.

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

The children were not placed together. Instead, B. was placed with a paternal aunt in Hemet while the twins were placed in the A. foster home. Following D.'s birth, he was also placed with the twins in the A. foster home.

In June 2002, the juvenile court terminated services for Mother as to B., K. and M. and set a section 366.26 hearing. As to D., the court denied reunification services and scheduled a section 366.26 hearing. In the summer of 2002, B. remained with her paternal aunt and the twins and D. remained with the A. foster home. All of the children were bonded to their caretakers who were providing them with excellent care and who wished to adopt them.

Regarding sibling visits, the children had been seeing each other regularly since their removal from parental custody. Both sets of prospective adoptive parents told the supervising social worker that no matter what was the end result of the dependency proceedings, they were committed to maintaining sibling contact.

By December 2002, Mother's whereabouts were unknown to the Department. On December 12, at the section 366.26 hearing, the Department recommended that parental rights be terminated and the children be placed for adoption with their respective caretakers. All four children were represented by one attorney who submitted the matter to the court. The court found the children adoptable and terminated parental rights.

INEFFECTIVE ASSISTANCE OF COUNSEL

Armed with section 366.26, subdivision (c)(1)(E),[2] Mother contends that the children had divergent interests at the section 366.26 hearing which were not effectively advocated because the children were represented by only one attorney. Given the conflict of interest among the children, she maintains that their attorney should have withdrawn from representing them as a group. Because he failed to withdraw, Mother argues that he provided ineffective assistance to the children.

A. Waiver.

As a threshold issue, the Department contends that Mother has waived this matter on appeal by failing to raise it at the trial court level. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338; *In re Aaron B.* (1996) 46 Cal.App.4th 843, 846.) Although the Department makes a strong argument to apply waiver, we will err on the side of caution and address Mother's claim.

B. Standing to Raise Ineffective Assistance of Counsel Claim.

Mother contends the children were provided with ineffective assistance of counsel. She argues the same counsel should not have represented all of the children because there

[2] Section 366.26, subdivision (c)(1)(E) provides for an exception to a court's decision to terminate parental rights: The exception is relevant when "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption."

was a conflict of interest owing to their interest in being adopted versus their siblings' interest in maintaining contact with them. The Department challenges Mother's standing to raise this issue.

In the past, there was a diversity of opinion among the Courts of Appeal whether a parent has standing to assert that counsel improperly represented multiple children with conflicting interests on the issue of sibling visitation. (See, e.g., *In re Cliffton B*. (2000) 81 Cal.App.4th 415, 425 [no standing]; *In re Candida S*. (1992) 7 Cal.App.4th 1240, 1252 [standing]; *In re Daniel H.* (2002) 99 Cal.App.4th 804, 809-812 [no standing]; *In re Frank L*. (2000) 81 Cal.App.4th 700, 703 [no standing].) In *Daniel H*., this court stated that standing to assert ineffective assistance in that context was probably conferred by the enactment of section 366.26(c)(1)(E) which allows trial courts to consider sibling relationships as a reason to decline to terminate parental rights. Given this new ground for refusing to terminate parental rights, we reasoned that a parent's interests are affected by ineffective litigation of the sibling visitation issue and thus, he or she should have standing to raise the point. (*In re Daniel H*., *supra*, 99 Cal.App.4th at pp. 811-812.) Since our decision in *Daniel H*., our colleagues in Division One of this District have addressed this issue and concluded that "a parent has standing to assert the section 366.26, subdivision (c)(1)(E) exception to the termination of parental rights to the same extent the parent has standing to assert the subdivision (c)(1)(A)-(D) exceptions to termination of parental rights." (*In re L. Y. L.*(2002) 101 Cal.App.4th 942, 951.) We agree with our colleagues in Division One. Thus, we will address the issue on its merits.

C. Conflict of Interest.

According to Mother, an actual conflict of interest existed between the children warranting separate counsel for each child. We disagree.

Before separate counsel is required, there must be an actual, not potential, conflict of interest. (*In re Candida S.*, *supra*, 7 Cal.App.4th 1240.) There is no actual conflict of interest merely because some children want visitation and others do not. As the court said in *In re Candida S.*: "Nothing would preclude counsel from informing the court that one child wants visitation and another does not. It would then be up to the court to determine whether there should be any visitation and, if so, with whom, the frequency and length of visitation. [Citation.] In the absence of any further facts, nothing in this record rises to the level of an actual conflict of interest requiring appointment of independent counsel." (*Id*. at p. 1253, fn. omitted.)

Similarly, we find no actual conflict of interest in this case merely because adoption, which is in the best interests of all the children, might impair their relationship with each other in the future. At the time of the hearing, B. was four years old, K. and M. were both two years old, and D. was eight months old. B. had been not living with the twins since October 2000, when they were 10 months old and she was a little more than two years old. As for D., she had never lived with him. The three younger children lived together in the same home that wished to adopt them. B. lived with her paternal aunt. Both homes expressed a desire to continue to allow the children to visit each other. Prior to the date of the section 366.26 hearing, they had enjoyed weekly visits with each other.

However, due to their young age, the benefits of adoption far outweighed any detriment which would result from interfering with their sibling relationships. (*In re Daniel H.*, *supra*, 99 Cal.App.4th 804, 813.)

Moreover, even assuming a conflict existed, failure to appoint separate counsel for siblings with alleged conflicting interests is subject to harmless error analysis. The test is whether there is a reasonable probability that independent counsel would have made a difference in the outcome. (*In re Daniel H*., *supra*, 99 Cal.App.4th 804, 813; *In re Candida S., supra,* 7 Cal.App.4th 1240, 1252.)

Here, Mother does not suggest what would have been done differently had separate counsel been appointed. Clearly, the children were too young to comprehend the meaning of adoption. Nonetheless, there is nothing in the record that revealed the children would oppose being adopted. There is also no indication that the adoptive parents would interfere with the children's relationships with each other. Instead, the evidence shows the opposite. According to the social worker's report of October 22, 2002, both prospective adoptive families have "expressed no matter what the end results may be, they will always maintain sibling contact."

On this record, it is not reasonably likely the court would have made a different ruling had independent counsel been appointed. Consequently, even if we concluded there were an actual conflict, we would find no basis for reversal.

D. Ineffective Assistance of Counsel.

"Where the ineffective assistance concept is applied in dependency proceedings . . . [f]irst, there must be a showing that 'counsel's representation fell below an objective standard of reasonableness . . . . [¶] . . . under prevailing professional norms.' [Citations.] Second, there must be a showing of prejudice, that is, [a] 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*In re Emilye A*. (1992) 9 Cal.App.4th 1695, 1711, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.)

Here, because we are unable to say that the court would have made a different ruling had independent counsel been appointed, we are likewise unable to say that Mother has been prejudiced by the children's counsel's representation.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

RICHLI
J.

KING
J.